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No. 432

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In the Supreme Court of the United States

JULIAN PEREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on July 31, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported but is reproduced herein as Petitioner's Appendix A.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit was filed and entered on July 31, 1968. No petition for rehearing was filed. The jurisdiction of this Court is invoked under Title 28 USC 1254.

QUESTION PRESENTED

1. Whether the opinion of the Court of Appeals deprives Petitioner of his constitutional right to a speedy trial as guaranteed by the Sixth Amendment.

STATUTES INVOLVED

The statute Petitioner was convicted of violating is Title 18 USC 2113(d), bank robbery. No question is raised as to the application of that statute in this proceeding. Other statutes which are peripherally involved are the Arkansas Statutes relating to "removal of a person in confinement", Arkansas Statutes 43-2607 which is reproduced herein as Petitioner's Appendix B and Title 28 USC Section 2241 relating to the power of district courts to grant writs of habeas corpus.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the Constitution of the United States of America, and particularly that part which reads "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . ."

STATEMENT

Petitioner, with two others, was charged with violation of Title 18 USC 2113(d), bank robbery. An information charging the offense was filed in April of 1965 and was superseded by an indictment returned on June 23, 1965. The offense was alleged to have occurred on November 19, 1961. One of the defendants, Paramo, entered a plea of guilty on December 14, 1965, and subsequently testified as a witness for the Government in the trial of the other defendant, Zurita, and in the trial of the Petitioner. The defendant, Zurita, was tried on December 20, 1965, and was found guilty.

At the time the information was filed and the indictment returned, Petitioner was incarcerated in the Arkansas State Penitentiary having been committed there as a result of a judgment of conviction of the crime of armed robbery by the Circuit Court of Garland County in Hot Springs, Arkansas. A sentence of six years was imposed upon Petitioner and the execution of that sentence was commenced on October 5, 1963. While in custody in the Arkansas State Penitentiary, he was served with a Federal warrant in June of 1965 charging him with the commission of the offense upon which he was ultimately convicted.

He was released from the Arkansas State Penitentiary on March 10, 1967, and delivered to a United States Marshal who returned him to the Northern District of Indiana to stand trial on the charge. The cause was submitted to trial by jury on July 19, 1967, and the jury returned a verdict of guilty on July 20, 1967. On September 13, 1967, the Court entered judgment and sentenced the Petitioner to a term of imprisonment of twenty years. Petitioner was admitted to bail pending appeal.

The sole error relied upon in the appeal to the United States Court of Appeals and in this proceeding is predicated upon the denial of Petitioner's Motion to Dismiss which is reproduced herein as Petitioner's Appendix C. The substance of the Motion to Dismiss asserts that Petitioner was deprived of his Sixth Amendment right to a speedy trial by the failure of the Government to take affirmative action to bring him to trial.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS DEPRIVES THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The question raised on this appeal was presented to the trial court by Motion to Dismiss. (App. C.) The Government, in opposition to the Motion to Dismiss, filed an affidavit by the Assistant United States Attorney stating in substance that some time in November of 1965 the affiant had two telephone conversations with the Warden of the Arkansas State Penitentiary in which he was advised by the Warden that Petitioner would not be made available to Government authorities for trial in December of 1965 and that he would not comply with a writ of habeas corpus ad prosequendum should the Government attempt to have such a writ issued. The United States Attorney further stated in that affidavit that he was advised by the Warden that the Petitioner could not be available to Federal authorities to be released for trial before December of 1966. The memorandum in opposition to the Motion to Dismiss and the affidavit of the Assistant United States Attorney is reproduced herein as Petitioner's Appendix D.

On the submission of the Motion to Dismiss, Petitioner testified that in June of 1965, while he was confined in the Arkansas State Penitentiary, he was advised by a prison official that he had been charged with robbery in Indiana. No one advised him that he had a right to demand a speedy trial, nor was he aware that such a right existed. At no time did he have an opportunity to obtain counsel. He

stated that if he had been aware of his right to demand immediate trial he would have done so since the detainer lodged against him made him ineligible for parole. He was approached on numerous occasions by F.B.I. agents who told him that if he confessed he could be brought to trial in Little Rock, Arkansas, if he would plead guilty. The testimony on the Motion to Dismiss is reproduced herein as Petitioner's Appendix E.

The opinion of the Court of Appeals affirming the judgment of conviction exonerates the conduct of the Government by finding that the Arkansas Rendition Statute is not obligatory but is merely permissive. This argument begs the question: The issue is not what the State of Arkansas would have been required to do had the Government pursued a writ of habeas corpus ad prosequendum but what the Government failed to do to attempt to obtain the presence of the Petitioner for trial when the co-defendant, Zurita, was tried in December of 1965. The lack of effort on the part of the Government cannot be condoned merely because the prosecution of such a writ may not have been successful. What is required is a bona fide effort, something more than two telephone calls to the Warden of the State Penitentiary one month before the trial of the co-defendant, Zurita.

Particularly significant in this context is the recently decided case by the Court of Appeals of New York in *People* v. *Winfrey,* 1967, 20 N.Y.2d 138, 281 NYS.2d 823. In *Winfrey,* the Defendant had been imprisoned in Alabama. Alabama was not a party to the Uniform Agreement on Detainers Act which provides for the automatic release of prisoners for prosecution in another state. He was imprisoned for a nine-month period after the return of the indictment in New York. In resisting a Motion to

Dismiss, the prosecution argued that since Alabama was not a party to the Uniform Agreement on Detainers Act, a request for release of the Defendant before his sentence was completed would have had a dubious result. The Court of Appeals in reviewing this argument noted that Alabama makes provision for transfer of defendants to other states at the discretion of the Governor and no such request was made. The Court of Appeals held that the failure of the New York officials to take action toward securing the presence of the Defendant violated the due process clause of the Fourteenth Amendment. In the opinion rendered by the Court of Appeals in the instant case, the argument made by Petitioner setting forth the *Winfrey* doctrine is completely ignored.

It should also be noted that another Arkansas Statute, the Uniform Extradition Act, provides:

> "If a criminal process has been instituted against such person under the laws of this State and is still pending, the Governor, at his discretion, either may surrender him on the demand of the executive authority of another state or may hold him until he has been tried and discharged or convicted and punished in this state." Arkansas Statute 43-3019.

The opinion of the Court of Appeals concedes that there is a

> ". . . trend toward requiring available advice of counsel in more and more instances and the disfavor in which Courts hold long delays in bringing incarcerated prisoners to trial. . . ." (pp. 5, 6, Opinion of Court of Appeals)

The American Bar Association has recently adopted a report setting forth standards relating to speedy trial, part of which is reproduced herein as Petitioner's Appendix F. The conduct of the Government in the case at bar

falls far short of those minimum standards in the following respects:

A. The United States Attorney failed to undertake to obtain the presence of the prisoner for trial *promptly*. The information was filed in April of 1965. The United States Attorney knew that the Defendant was incarcerated in Arkansas at the time; yet, it was not until November of 1965, more than six months after the information had been filed, that the United States Attorney made any gesture toward obtaining the presence of the defendant to be available for the trial of the co-defendant, Zurita, in December of 1965. Two telephone calls to the Warden of the state prison can scarcely be regarded as a bona fide effort to obtain the presence of the prisoner promptly.

B. Although a detainer was filed with the official having custody of the defendant, the United States Attorney did not request that official to advise the prisoner of his right to demand trial.

C. The official having custody of the Petitioner did not promptly advise the Petitioner of his right to demand trial. The evidence is uncontradicted that not only was there a complete failure on the part of any official or Government agent to advise the Petitioner of his right to demand trial, but that Petitioner was unaware that such a right existed.

Thus, the Government failed to conform to any of the minimum standards relating to a speedy trial adopted in the American Bar Association Project on Minimum Standards for Criminal Justice. Although this issue was extensively argued before the Court of Appeals and was raised at considerable length in the Brief, the opinion of the Court of Appeals, except for the sparse quote hereinabove set forth, ignores this issue.

II.

FAILURE OF THE GOVERNMENT TO ADVISE PETITIONER OF HIS RIGHT TO DEMAND TRIAL DISPENSES WITH THE NECESSITY FOR SUCH DEMAND.

In light of *Miranda* v. *Arizona,* 1966, 384 U.S. 436, 86 S.Ct. 1602, the "demand rule" of *U.S.* v. *Lustman,* C.A. 2 (1957), 258 F.2d 475 is no longer viable. The right to counsel to a person already in custody cannot be less significant or less meaningful than the right to counsel of a person who prior to the time he is arrested has been at liberty. The need for the guidance and instruction of counsel for the prisoner already in custody is equally imperative. The consequences which may result from the lack of counsel to the prisoner in custody are equally pernicious. It is patently absurd to presume that a prisoner in custody is aware of his right to demand a speedy trial and when he fails to make such demand, blithely state that he has waived a fundamental constitutional right.

Waiver presupposes knowledge of a right and an intelligent and knowing determination to forfeit that right. There is a presumption against waiver of fundamental constitutional rights and the acquiescence in the loss of fundamental rights is never presumed. *Taylor* v. *U.S.,* C.A.D.C. 1956, 238 F.2d 259; *Johnson* v. *Zerbst,* 1938, 304 U.S. 458. This Court in considering the Sixth Amendment right to a speedy trial in another context has stated:

> "The history of the right to a speedy trial and its inception in this country clearly establishes that it is one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina,* 1967, 386 U.S. 15, 87 S.Ct. 988.

Illustrative of the judicial trend in this area is the recent District Court opinion by Judge Youngdahl in *U.S.* v. *Reed,* USDC, DC 5/29/68, reported in BNA 3 CrL 2267. The District Court there held that a resident of the District of Columbia who was indicted on a car theft charge while serving a Maryland prison sentence was entitled to discharge because of a 26-month delay after his indictment. The delay in the prosecution was due to the carelessness of the District of Columbia officials which was compounded by the negligence of the Maryland authorities who had misplaced the detainer lodged against the Defendant while he was imprisoned there.

While the factual situation in *Reed* is markedly distinguishable from the factual situation in the case at bar, the rationale which prompted the trial court to order the discharge of the Defendant in *Reed* is applicable here. Of particular significance is the statement of Judge Youngdahl:

> " . . . there is no waiver of one's speedy trial right where the Defendant has no knowledge of the pending charge *or where he is powerless to assert his right because of imprisonment, ignorance and lack of advice.*" (At p. 2268; our emphasis)

The guidelines laid down by this Court in *Miranda,* at least insofar as the right to advice of counsel is concerned, should logically be extended to prisoners already in custody under a commitment from another jurisdiction. The record in this case discloses that the Petitioner had no knowledge of what his rights were upon being served with the warrant of arrest in June of 1965. If upon being interrogated by the F.B.I. agents he was not advised of his right to remain silent and that any statement he made would be used in evidence against him, and he had made

a confession without benefit of the Miranda warnings, there is no doubt that such a confession would have been inadmissible in the trial of his cause. The rationale requiring the *Miranda* warnings is based in part upon the need to preserve a Defendant's constitutional privilege against self-incrimination.

The logical query, therefore, is: Does the Sixth Amendment right to a speedy trial attain the same dignity and stature as the Fifth Amendment privilege against self-incrimination? Nothing in the history of either amendment or in decisions rendered by this Court interpreting either amendment suggests that one stands on a higher plane than the other. Indeed, this Court has stated in *Klopfer* that the right to a speedy trial is a basic right preserved by our Constitution.

The "demand rule" of *Lustman* and the guidelines laid down in *Miranda,* particularly with reference to the right to counsel, cannot co-exist; one must give way to the other. If it is conceded that the Sixth Amendment right to a speedy trial is of equal stature and dignity as all of the other rights accorded by our Constitution, *Lustman* has outlived its usefulness; the unrealistic requirement that the prisoner make demand emasculates and renders meaningless the right to a speedy trial.

The Court of Appeals for the Fourth Circuit has cited with apparent approval the American Bar Association Project of Minimum Standards for Criminal Justice in the recent case of *Pitts* v. *North Carolina,* C.A. 4, BNA 3, CrL 2105, 4/1/68. In the *Pitts* case, the argument was advanced that the Defendant had waived his right to a speedy trial for failure to make demand of the same. The Court of Appeals there noted that there are well-recognized exceptions to the demand rule. In *Lustman* and

in *Chinn* v. *U. S.*, C.A. 4, 228 F.2d 151 (1955), those exceptions are where the Defendant has no knowledge of the pending charge and where the Defendant is powerless to assert his right because of imprisonment, ignorance and lack of legal advice. *Hill* v. *U.S.*, C.A. 4, 310 F.2d 601 (1962); *U. S.* v. *Chase*, N.D. Ill., E.D. (1955) 135 Fed. Supp. 230.

The opinion of the Court of Appeals in the *Pitts* case discloses extensively the adverse side effects and prejudice which result when an inter-state detainer is placed against a prisoner in custody. Among the consequences resulting from such an action are that the detainee is seriously hampered in his request for parole or commutation. It should be noted that in Petitioner's Motion to Dismiss in the case at bar, Petitioner specifically alleges that the detainer resulted in his serving the maximum sentence in Arkansas and Petitioner specifically testified that the detainer made him ineligible for early parole. **(App. C, D)**

In *Pitts*, the Court, after citing the ABA Report on Standards relating to speedy trial and noting the section that would require the prosecutor upon filing a detainer that the prisoner be advised of the charge and of his right to demand trial concludes:

> "Since this ingredient of basic fairness was excluded by keeping the prisoner in ignorance of his right to demand a trial, we will not hold that he has waived his fundamental right to a speedy trial by failing to seek an immediate hearing 7 years after the prosecution had initiated proceedings against him." (at p. 2106)

CONCLUSION

Under the provisions of 28 USC 2241, the District Court had the power and authority to issue a Writ of Habeas Corpus ad prosequendum. The Government at no time attempted to invoke this statutory procedure. Similarly, no request was ever made upon the Governor of the State of Arkansas under the provisions of Arkansas Statutes 43-3019 to surrender the Petitioner for trial. Whether or not a defendant, and particularly this Petitioner, should have been released for trial should not be dependent on the whim or caprice of a State police officer. There should have been minimally a judicial determination that the State of Arkansas would not surrender the Petitioner for trial. The procedure sanctioned by the Court of Appeals in the instant case lodges the protection of a fundamental constitutional right in the tender hands of the police. The history of the administration of criminal justice has time and again clearly demonstrated that policemen are vocationally inept to fulfill this trust.

The judgment should be reversed.

Respectfully submitted,

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